STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal From The Court Of Appeals
Judges: Cynthia D. Stephens, Joel P. Hoekstra, Patrick M. Meter

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PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs.

LORINDA IRENE SWAIN,
Defendant-Appellant.

Supreme Court No. 150994
Court of Appeals No. 314564
Lower Court No. 2001-004547-FC

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 1

STATEMENT OF QUESTIONS INVOLVED 2

INTRODUCTION 4

STATEMENT OF FACTS 5

A. The Evidence at Trial 5
B. Direct Appeal and Post-Conviction Motions 7
C. Current Motion for Relief from Judgment 7
D. The 2011-12 Evidentiary Hearing 9
1. Ms. Swain's Witnesses 9
2. Prosecution's Witnesses 14
3. Ms. Swain's Rebuttal Evidence 14
E. Trial Court Order Granting Relief from Judgment 15
F. Court of Appeals Decision Reversing Trial Court 16

ARGUMENT 18

I. A Defendant Need Not Satisfy the Four Prongs of *Cress* in Order to Satisfy MCR 6.502(G)(2) 18

A. The Plain Language of the Court Rule Forecloses an Insertion of *Cress* Into the MCR 6.502(G)(2) Inquiry Because the Court Rule is Unambiguous and Does Not Invite Further Interpretation 19

B. A Holistic Reading of the Michigan Court Rules Prohibits the Application of *Cress* to MCR 6.502(G)(2) 20

C. Grafting *Cress* Onto MCR 6.502(G)(2) Would Undermine the Rights of Defendants Alleging Constitutional Violations, Including *Brady* and *Strickland* Claims 22

II. Under the Correct Reading of the Court Rules, Ms. Swain Satisfies Both MCR 6.502(G)(2) and MCR 6.508(D)(3) 24

A. Ms. Swain Satisfies MCR 6.502(G)(2) Because She Did Not Discover the Exculpatory Phone Call Until After Her Previous Motion for Relief From Judgment Was Filed 24

B. Ms. Swain's *Brady* Claim Also Satisfies MCR 6.508(D)(3) 25

III. The Court of Appeals Erred in Reversing the Trial Court's Decision to Grant Ms. Swain Relief from Judgment on the Basis of her *Brady* Claim 26

A. The Court of Appeals Misapplied *Brady* by Incorrectly Defining the Evidence at Issue —Directly Contradicting *Brady* Itself—and Reading in Unwarranted Requirements 26

1. *The Court of Appeals' Application of* Brady *is Plainly Incorrect Because it Would Lead to the Opposite Result in* Brady *Itself* 27
2. *The Court of Appeals' Reasoning Improperly Places a Burden on Defendants that is Unsupported by* Brady 29

B. The Court of Appeals Erred in Finding that Ms. Swain Had Not Proven a *Brady* Violation and in Failing to Defer to Judge Sindt's Findings 31

1. *Dennis Book's Conversation with Detective Picketts Was Suppressed* 31
2. *The Information the Police Withheld was Favorable to Ms. Swain* 31
3. *Prejudice Resulted from the Government's Failure to Disclose the Exculpatory Phone Call* 32

IV. This Court Should Recognize an Exception to MCR 6.502(G)(2) Where The Defendant Can Demonstrate Actual Innocence 33

A. This Court Should Join the Federal Courts and Many Other States That Have Recognized Actual Innocence Exceptions to Procedural Default. 34

B. The Appropriate Standard for the Actual Innocence Exception in the Context of MCR 6500, *Et Seq.*, is a "Significant Possibility" That a Rational Jury Could Not Find the Defendant Guilty Beyond a Reasonable Doubt 36

V. The Record Demonstrates That Ms. Swain Meets Whatever Actual Innocence Standard The Court Chooses To Apply 38

VI. Michigan Court Rules 7.316(A)(7) and 7.216(A)(7) Provide a Basis for the Appellate Courts to Grant Relief on Actual Innocence Grounds 42

VII. MCL 770.1 Gives the Trial Court Discretionary Authority to Grant a New Trial When Justice Has Not Been Done 44

VIII. The United States and Michigan Constitution Provide a Basis for a Freestanding Claim of Actual Innocence 46

A. The Michigan Constitution 46
B. The United States Constitution 49

CONCLUSION AND RELIEF REQUESTED 50

TABLE OF AUTHORITIES

Cases

Alken-Ziegler, Inc v Waterbury Headers Corp, 461 Mich 219; 600 NW2d 638 (1999) 18, 31

Banks v Dretke, 540 US 668; 124 S Ct 1256; 157 L Ed 2d 1166 (2004) 30

Benge v Johnson, 474 F3d 236 (CA 6, 2007) 29

Bluemel v State, 2007 UT 90; 173 P3d 842 (2007) 35

Brady v Maryland, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963) ..... *passim*

Brady v State, 226 Md 422; 174 A2d 167 (1961) 27

Carriger v Stewart, 132 F3d 463 (CA 9, 1997) 49

Clay v Dormire, 37 SW3d 214 (Mo, 2000) 35

Coker v Georgia, 433 US 584; 97 S Ct 2861; 53 L Ed 2d 982 (1977) 47

Collins v City of Harker Heights, 503 US 115; 112 S Ct 1061; 117 L Ed 2d 261 (1992) 48

Engle v Isaac, 456 US 107; 102 S Ct 1558; 71 L Ed 2d 783 (1982) 34

Enmund v Florida, 458 US 782; 102 S Ct 33368; 73 L Ed 2d 1140 (1982) 43

Everson v. Calhoun County, 407 Fed Appx 885 (CA 6, 2011) 15

Ex Parte Elizondo, 947 SW2d 202 (Tex Crim App, 1996) 44, 49

Ferguson v State, 325 SW3d 400 (MO App, 2010) 44

Gladych v New Family Homes, 468 Mich 594; 664 NW2d 705 (2003) 20

Herrera v Collins, 506 US 390, 113 S Ct 853, 122 L Ed 2d 203 (1993) ..... *passim*

Hinkle v Wayne County Clerk, 467 Mich 337; 654 NW2d 315 (2002) 19

Houston v Governor, 491 Mich 876; 810 NW2d 255 (2012) 21

In re Clark, 5 Cal 4th 750; 21 Cal Rptr 2d 509; 855 P2d 729 (1993) 34, 49

In re Winship, 397 US 358; 90 S Ct 1068, 25 L Ed 2d 368 (1970) 43

Jones v Taylor, __ F3d __, 2014 WL 4067217 (CA 9, 2014) 49

Kyles v Whitley, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995) 31, 32

McDougall v Schanz, 461 Mich 15; 597 NW2d 148 (1999) 45

Miller v Commissioner of Corrections, 242 Conn 745; 700 A2d 1108 (1997) 44, 49

Montoya v Ulibarri, 142 NM 89; 163 P3d 476 (2007) 44, 47, 48

Morse Chain Co v Formsprag Co, 380 Mich 475; 157 NW2d 244 (1968) 42

Murray v Carrier, 477 US 478; 106 S Ct 2639; 91 L Ed 2d 397 (1986) 34, 35
Pellegrini v State, 117 Nev 860; 34 P3d 519 (2001) 35
People v Anderson, 389 Mich 155; 205 NW2d 461 (1973) 43
People v Barbara, 400 Mich 352; 255 NW2d 171 (1977) 39
People v Bullock, 440 Mich 15; 485 NW2d 866 (1992) 47
People v Carines, 460 Mich 750; 597 NW2d 130 (1999) 36
People v Chenault, 495 Mich 142; 845 NW2d 731 (2014) 22-23, 30-31
People v Cole, 1 Misc 3d 531; 765 NYS2d 477 (NY Sup Ct, 2003) 44, 47-48
People v Cress, 468 Mich 678; 664 NW2d 174 (2003) ..... *passim*
People v Douglas, 496 Mich 557; 852 NW2d 587, 612 (2014) 37
People v Hampton, 407 Mich 354; 285 NW2d 284 (1979) 46
People v Johnson, 391 Mich 834; 218 NW2d 378 (1974) 46
People v Lemmon, 456 Mich 625; 576 NW2d 129 (1998) 45
People v Lorentzen, 387 Mich 167; 194 NW2d 827 (1972) 47
People v Reed, 449 Mich 375; 535 NW2d 496 (1995) 4, 48
People v Rao, 491 Mich 271; 815 NW2d 105 (2012) 18
People v Roberts, 292 Mich App 492; 808 NW2d 290 (2011) 31
People v Sierb, 456 Mich 519; 581 NW2d 219 (1998) 48
People v Tate, 477 Mich 1066; 728 NW2d 823 (2007) 41
People v Terlisner, No. 315670, 2014 WL 4214895 (Mich App Aug 26, 2014) 45
People v Washington, 171 Ill 2d 475; 216 Ill Dec 773; 665 NE2d 1330 (1996) 44, 47
Rafferty v Markovitz, 461 Mich 265; 602 NW2d 367 (1999) 22
Reedy v Wright, 60 Va Cir 18 (2002) 35
Robinson v California, 370 US 660; 82 S Ct 1417; 8 L Ed 2d 758 (1962) 43, 49
Schlup v Delo, 513 US 298; 115 S Ct 851; 150 L Ed 2d 808 (1995) 37, 38
St John v Nichols, 331 Mich 148; 49 NW2d 113 (1951) 42
State v Huffman, 643 NE2d 899 (Ind, 1994) 34
State v Nash, 142 NM 754; 170 P3d 533 (NM App, 2007) 35
Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) 22-24, 38
Strickler v Greene, 527 US 263; 119 S Ct 1936; 144 L Ed 2d 286 (1999) 38

United States v Agurs, 427 US 97; 96 S Ct 2392; 49 L Ed 2d 342 (1976) 32

United States v Olano, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993) 35

United States v Tavera, 719 F3d 705 (CA 6, 2013) 26, 28-30

United States Fid Ins & Guar Co v Michigan Catastrophic Claims Ass'n, 484 Mich 1; 795 NW2d 101 (2009) 21

Rules and Constitutional Provisions

MCL 770.1 ..... *passim*

MCL 770.2 45

MCL 770.2(1) 45

MCL 770.2(4) 46

MCR 1.201(D) 36

MCR 2.611(A)(1)(f) 22

MCR 6.431 45

MCR 6.502(F) 9

MCR 6.502(G) 8, 16, 18, 20, 33, 36

MCR 6.502(G)(2) ..... *passim*

MCR 6.508(D) 35-37

MCR 6.508(D)(3) ..... *passim*

MCR 6.508(D)(3)(a)-(b)(i) 25

MCR 7.216(A)(7) 2, 42, 43

MCR 7.316(A)(7) 2, 42, 44

Mich Const art 1, § 16 47

Mich Const art 1, § 17 48

U.S. Const amend VIII 47

Other Authorities

Friedman, *Hurdling the 6500 Barrier: A Guide to Michigan's Post-Conviction Remedies*, 14 Cooley L Rev 65, 85-86 (1997) 35

"Jury awards former Battle Creek dispatcher $1 million in lawsuit involving Calhoun County Sheriff's Department," August 21, 2012; *available at*: http://www.mlive.com/news/kalamazoo/index.ssf/2012/08/former_battle_creek_dispatcher.html ... 15

Ariz R Crim P 32.1(h) 44
MD Crim Pro Code Ann § 8-301(a)(1) 44
Utah Code Ann § 78B-9-404 44

STATEMENT OF JURISDICTION

Defendant-appellant Lorinda Swain appeals from the unpublished February 5, 2015, Court of Appeals amended opinion reversing Calhoun County Circuit Judge Conrad J. Sindt's August 21, 2012, Opinion and Order granting Ms. Swain's motion for relief from judgment.[1] On February 5, 2015, Ms. Swain filed a timely application for leave to appeal to this Court.

On September 30, 2015, this Court granted the application and directed the parties to brief six questions. This Court has jurisdiction pursuant to MCR 7.303(B)(1).

[1] The Court of Appeals originally issued an opinion on December 11, 2014, but it issued a virtually identical amended opinion on February 5, 2015, the same day that Ms. Swain filed her application to this Court. On February 18, 2015, Ms. Swain amended her application to this Court to reflect that she was now appealing from the February 5, 2015, amended opinion.

STATEMENT OF QUESTIONS INVOLVED

I. Does the test set forth in *People v Cress* apply in determining whether a subsequent motion for relief from judgment is based on "a claim of new evidence that was not discovered before the first such motion" under MCR 6.502(G)(2)?

The Trial Court answered: "No."
The Court of Appeals answered: "Yes."
Defendant-Appellant answers: "No."

II. Has Ms. Swain satisfied the procedural requirements of MCR 6.502(G)(2) and 6.508(D)(3)?

The Trial Court answered: "Yes."
The Court of Appeals answered: "No."
Defendant-Appellant answers: "Yes."

III. Is Ms. Swain entitled to a new trial on the basis of *Brady v Maryland*, where the prosecution withheld a phone interview with her hostile former boyfriend, who lived in the house at the time of the alleged abuse, in which he told the lead detective that Ms. Swain had not committed the alleged abuse?

The Trial Court answered: "Yes."
The Court of Appeals answered: "No."
Defendant-Appellant answers: "Yes."

IV. If Ms. Swain's *Brady* claim is barred by MCR 6.502(G)(2), should this Court recognize an "actual innocence" exception to that rule that would permit her claim to be considered on the merits?

The Trial Court did not answer.
The Court of Appeals did not answer.
Defendant-Appellant answers: "Yes."

V. Does Ms. Swain meet the standard for actual innocence under any applicable court rule, statute, or constitutional provision?

The Trial Court answered: "Yes."
The Court of Appeals answered: "No."
Defendant-Appellant answers: "Yes."

VI. Is relief available to an actually innocent defendant such as Ms. Swain under MCR 7.316(A)(7) or MCR 7.216(A)(7)?

The Trial Court did not answer.
The Court of Appeals did not answer.
Defendant-Appellant answers: "Yes."

VII. Is Ms. Swain entitled to a new trial under MCL 770.1, where the trial court had "no doubt" in finding a significant possibility of Ms. Swain's innocence?

The Trial Court answered: "Yes."
The Court of Appeals answered: "No."
Defendant-Appellant answers: "Yes."

VIII. Does the Michigan or United States Constitution provide an independent basis for relief to a defendant who demonstrates her actual innocence?

The Trial Court answered: "Yes."
The Court of Appeals answered: "No."
Defendant-Appellant answers: "Yes."

INTRODUCTION

This case presents an opportunity for this Court to reaffirm the importance of giving deference to trial courts in the post-conviction context —particularly where relief has been granted by the same judge who personally oversaw the trial. Circuit Judge Conrad Sindt, the former elected prosecutor of Calhoun County, acted well within his discretion in finding that Ms. Swain's post-conviction witnesses were credible, that a *Brady* violation occurred, and in determining that relief from judgment is warranted. The Court of Appeals therefore overstepped its authority under the abuse of discretion standard in reversing Judge Sindt's decision. This Court could simply reverse and remand this case for a new trial on that narrow basis.

There are also broader questions presented in this case, should the Court reach them. When and how actual innocence is considered in post-conviction proceedings is a question of fundamental importance that this Court has sought to address before. This case presents the best opportunity yet to clarify this area of the law. Not only did Judge Sindt make clear that he has "no doubt about" Ms. Swain's innocence, Court of Appeals Judge Stephens also concluded that "it is more likely than not that no reasonable juror would have found the defendant guilty" in light of the evidence. This case therefore presents this Court with the ideal context in which to recognize and define standards for actual innocence exceptions to the procedural hurdles of MCR 6.500 *et seq*, and other freestanding bases for relief under the court rules, MCL 770.1, or one of several state and federal constitutional provisions.

This Court has long recognized that "the most fundamental injustice is the conviction of an innocent person." *People v Reed*, 449 Mich 375, 392; 535 NW2d 496 (1995). By whichever avenue the Court proceeds, it should reinstate the trial court's decision, and in the process reaffirm the crucial notion that our courts must always remain open to evidence of innocence.

STATEMENT OF FACTS

Lorinda Swain was sentenced to 25-50 years in prison for a crime the complainant—her adopted son, Ronnie Swain—has admitted under oath never occurred. When he was fourteen years old, Ronnie was confronted with allegations that he molested his niece; in response to the confrontation, he told a story that his mother had abused him years earlier when he was five to eight years old. Not only has Ronnie, who is now an adult, admitted his story was a lie many times over the years, including under oath at the most recent hearing, but independent new evidence confirms Ms. Swain's innocence.

Unlike most cases involving claims of sexual abuse committed years earlier, this case turns on independently verifiable facts about Ms. Swain's opportunity to commit the crimes. And, as Judge Sindt found, those independently verifiable facts, including the accounts of at least three disinterested witnesses, all belie the story Ronnie told at trial and support his recantation. The most significant new witness, Dennis Book, actually told the police prior to trial that he could confirm the allegations against Ms. Swain were false. That exculpatory interview was never disclosed to the defense, and Book's exculpatory account remained unknown to the defense until 2011, despite Ms. Swain's effort to seek Book's account on her own.

A. The Evidence at Trial

At trial Ronnie testified that Ms. Swain put her mouth on his penis *every weekday* before school from when he was five until he was approximately eight. (38a, 46a-47a). Ronnie said that his younger brother, Cody, was sent to wait for the bus during these incidents. (38a). According to the story, when the bus was approaching, Cody would run back to the house and bang on the door to signal to Ms. Swain to send Ronnie outside. (38a, 46a-47a). Ronnie testified that this conduct occurred *every day*, except for weekends. (46a-47a). Cody, then thirteen years old,

confirmed the story about waiting alone for the bus and running back to knock on the door. (51a). Like Ronnie, Cody has since admitted that his trial testimony on this point was a lie. (287a).

Detective Guy Picketts of the Calhoun County Sheriff's Department, the lead investigating officer, testified about his investigation and his interview with Ms. Swain. Picketts testified that "once [he] started to say the complaint involved oral sex" and the complainant was Ronnie, Ms. Swain strongly denied the allegations, stating, "I never sucked my kid's dick."(58a-59a).[2]

The only other "evidence" of any kind offered against Ms. Swain was the testimony of serial jailhouse informant Deborah Charles, who claimed Ms. Swain confessed to her. (55a). There is no dispute that Charles is a habitual liar. She has been convicted of uttering and publishing 19 times and has at least eight additional felony convictions relating to dishonesty (forgery, false pretenses, etc.). (89a-95a). Another inmate testified that Charles admitted that her testimony against Ms. Swain was a lie. (74a). Indeed, Charles has claimed on several occasions to have information on cases she obviously knew nothing about—such as the 1996 murder of JonBenet Ramsey in Boulder, Colorado—and the **MDOC investigator who worked with her**

[2] The Court of Appeals majority misstated, in an important way, this part of the Picketts testimony. The opinion stated that Ms. Swain denied the accusations *before* Picketts had even told her what the specific allegation was or who the alleged victim was. (507a). However, this is a plain misstatement of the testimony, as the transcript citation above confirms. Further proof that the Court of Appeals summary is a misstatement of the record comes from Detective Picketts's September 7, 2001, police report: "After Lorinda Swain read her rights and indicated she would talk to the R/D, R/D advised her that she was under investigation in regards to a Criminal Sexual Conduct complaint filed with the Calhoun County Sheriff's Department by Ronald and Linda Swain. **R/D advised Lorinda Swain that the victim was one Ronald** [sic] **Swain. When she inquired as to what type of sex complaint, R/D started to say it involved oral sex**, and at that point in time Lorinda Swain became extremely excited and animated and yelled at the R/D, and her statement was 'I never sucked my kid's dick.'" (33a-34a) (emphasis added).

concluded that she is not to be trusted. (87a-88a).[3]

Ms. Swain testified in her own defense, denying all of the allegations of sexual abuse.

The jury deliberated for two full days and part of a third day before announcing it was deadlocked, and returned a verdict only after being given a deadlocked jury instruction. (150a).

B. Direct Appeal and Post-Conviction Motions

Ms. Swain appealed her conviction to the Court of Appeals raising, among other claims, the recantation of Ronnie Swain, which had first been raised in a motion for new trial in the trial court. (79a-81a). By this point, Ronnie Swain had already emphatically and consistently recanted his allegations against his mother. (246a-258a). He admitted that he came up with the allegations to explain away his behavior after his stepmother found him engaging in sexual misconduct with a younger relative. (250a-251a). He tried to correct his lie by speaking to the media, to prosecutors, and to the police, and by taking and passing a polygraph exam during which he admitted his trial testimony was false. (253a-255a; 352a-353a).

Subsequently, Ms. Swain filed at least one prior motion for relief from judgment, which the trial court denied.

C. Current Motion for Relief from Judgment

On March 19, 2009, represented by current counsel, Ms. Swain filed the instant motion for relief from judgment, raising two claims relevant to this appeal: (1) newly discovered evidence under the *Cress* standard, consisting of two different areas of new evidence: (a) the recantation of Cody Swain, and (b) new testimony from school bus driver, Tanya Winterburn,

[3] The Court of Appeals opinion also has a lengthy summary of the testimony of Dr. Randall Haugen, an expert on sexually abused children. (507a). Given that Dr. Haugen could not comment on the truth of Ronnie's allegations and just gave general testimony about behaviors of sexual abuse victims, his testimony was of limited importance. Additionally, to the extent such expert testimony carries any weight, Ms. Swain notes that Dr. Stephen Miller, a clinical psychologist, interviewed Ronnie and concluded that Ronnie's "recantation of his original allegations of sexual abuse [is] entirely plausible, sincere and reliable." (82a-86a).

and a neighbor, William Risk, establishing that the Swain boys waited for the school bus together, contrary to Ronnie's trial testimony that Cody was sent out to wait for the bus alone every day while Ms. Swain sexually abused Ronnie; and (2) an alternative claim of ineffective assistance of counsel for prior counsel's failure to present the testimony of Winterburn and Risk.

After a 2009 evidentiary hearing, Judge Sindt found that the evidence from Winterburn and Risk substantially undermined the prosecution's case. He held that the testimony was not newly discovered evidence itself, but he agreed with Ms. Swain's alternative argument that the failure to present these exculpatory witnesses at trial and on appeal constituted ineffective assistance of trial and appellate counsel. (151a-154a). On that ineffective assistance claim, Judge Sindt granted Ms. Swain's motion for relief from judgment. (156a-158a).

The Court of Appeals originally denied the prosecution's application for leave to appeal. After this Court remanded for consideration as on leave granted, *People v Swain*, 485 Mich 997; 775 NW2d 147 (2009),[4] the Court of Appeals reversed Judge Sindt's 2009 order in a published opinion in 2010. The appellate court held that, because Ms. Swain knew at trial that Winterburn and Risk could give exculpatory testimony contradicting Ronnie's claims, this evidence did not satisfy the gateway new evidence standard of MCR 6.502(G)(2). *People v Swain*, 288 Mich App 609, 634–35; 794 NW2d 92 (2010). Ms. Swain sought leave to appeal in this Court, which denied leave by a 4-3 vote on December 16, 2010. *People v Swain*, 488 Mich 992; 791 NW2d 288 (2010). The Court denied reconsideration by the same vote on April 28, 2011. *People v Swain*, 489 Mich 902; 796 NW2d 257 (2011).

On May 5, 2011, once jurisdiction returned to the trial court, Ms. Swain moved that court

[4] This Court directed the appellate court to address (1) whether Ms. Swain's successive motion for relief from judgment was barred by MCR 6.502(G), and (2) if it was, whether her constitutional rights were implicated given that the trial court found a significant possibility of her innocence.

to decide two remaining claims from her 2009 motion (the recantation of Cody Swain and an unrelated ineffective assistance of appellate counsel claim). Ms. Swain also sought permission to supplement her 2009 motion for relief from judgment with an additional claim—a *Brady* violation based on new evidence—under MCR 6.502(F).

On May 16, 2011, the trial court ordered an evidentiary hearing on the remaining and supplemental claims. The prosecution objected, and argued in the Court of Appeals that the trial court could not hear the remaining and supplemental claims. However, the Court of Appeals disagreed and remanded the case for an evidentiary hearing on the claims. (160a-164a).

D. The 2011-12 Evidentiary Hearing

1. *Ms. Swain's Witnesses*

Dennis Book lived with Ms. Swain and her two adopted sons at their trailer on Nine Mile Road in Union City for nearly all of the time she was allegedly sexually abusing Ronnie on a daily basis. (170a-173a, 222a-223a). Book testified that he met Ms. Swain in September 1994 at the Harvester Bar in Climax. (170a-171a, 219a). He recalled that they met on the first day of school for Ms. Swain's children, and they started dating immediately. (220a-221a). By November 1994, he was spending almost every night at the trailer on Nine Mile Road. (222a-223a). By early 1995, when the daily sexual abuse was supposedly occurring, he had practically moved into the trailer. (223a-225a). He would "come home at night and be there all night, get up in the morning . . . [and] go to work after the kids went to school." (223a).

During this period of time, Book became involved in Ronnie's and Cody's lives. (212a) ("I took them fishing and—and we camped out and did all kinds of stuff."). He was there in the morning when Ms. Swain would get the boys ready for school and when the bus picked them up. (226a). Book testified that he could not recall ever leaving the trailer before the children left for the bus, because he wanted to spend time with Ms. Swain before he left for work. (227a).

While still living with Ms. Swain and her two sons, in November 1996, Book bought the trailer they lived in from Ms. Swain's father, George Johnson. (173a). Shortly thereafter, Book and Ms. Swain had a falling out, and Ms. Swain moved out "probably two/three months" after he bought the trailer. (225a, 228a-229a).

After Ms. Swain moved out she and Book continued to see each other periodically until 2000, when the relationship ended for good. (174a, 242a-243a). Book had grown angry toward Ms. Swain for using drugs and seeing other men, so he cut off contact with her completely. *Id.* ("I hated her so bad I couldn't—didn't want to hear her name, nothing.").

Book was not aware that Ms. Swain had been arrested for sexually abusing Ronnie until he received a phone call from Detective Guy Picketts around 2002. (175a).[5] Book recalled this phone call specifically, remembering where he was and the time of day when he received the call. *Id.* When Picketts asked Book about the alleged sexual abuse, Book firmly told him that the allegation was not true, and that Ms. Swain never abused Ronnie. (176a). Book told Picketts that if he thought Ms. Swain was sexually abusing Ronnie, he would have called the police and turned her in himself. *Id.* Indeed, Book testified that he did report Ms. Swain to the authorities on other occasions when she broke the law. *Id.*; see also (70a). He testified that if the allegations were true—if Ms. Swain was really sending Cody out to wait for the bus every day while she performed oral sex on Ronnie—he would have known about it, because he would have been in the trailer at the time. (179a).

Book testified that he was not speaking to Ms. Swain around the time that she was arrested. (177a). When Ms. Swain's father went to Book's house to see if he might be a potential

[5] It makes sense that Detective Picketts would have called Book before trial because police documents show that Picketts knew that the alleged sexual abuse had occurred at a time when Book was living at the trailer with Ms. Swain and her boys. (31a-32a).

witness for Ms. Swain's defense, Book refused and "told him [he] didn't want nothing to do with it" because he was "still pretty angry with her . . . ." (235a); see also (206a-207a). He did not attend Ms. Swain's trial. (177a). When Ms. Swain tried to call him around the time of her trial, he did not take her calls. *Id.* When she wrote to him, he threw her letters away. (178a).

Book continued to feel angry toward Ms. Swain and refused to speak to her for several years after she was convicted. (177a-178a). But Book also testified that, if subpoenaed, he would have come to court and truthfully testified that the allegations against Ms. Swain were false. (178a).

Book never told anyone about the phone call from Detective Picketts until 2011, when he visited Ms. Swain after she had been released from prison. (176a-177a, 180a). He testified that he is "basically a hermit" and does not talk to many people. (232a). He did not know the significance of his phone call with Picketts until much later, and he initially did not deem the incident worth discussing. (208a).

Trial counsel **Edwin Hettinger** testified that the prosecution never turned over any information about the Dennis Book interview. (311a-312a). Hettinger did not call Book as a witness at Ms. Swain's trial because he learned from Ms. Swain and her father that Book would be hostile, given the fact that he and Ms. Swain had gone through a bad break-up. (310a-311a). If Hettinger had known that Book made the statements to Detective Picketts that he testified to making at the 2011-12 evidentiary hearing, he would have at least interviewed Book and probably would have subpoenaed him. (315a); see also (313a).

Ronnie Swain testified at the evidentiary hearing and confirmed that Book lived at the trailer on Nine Mile Road during the period of the alleged abuse. (249a). Ronnie remembered that Book would be "[r]ight there in the living room" in the morning while the boys were getting ready for school. (255a-256a, 261a).

Ronnie also testified that his previous allegations of sexual abuse against Ms. Swain were false. (247a-248a, 251a). He explained why he had lied: his stepmother, Linda Mort-Swain, had learned that Ronnie had been sexually abusing his niece. (250a). His stepmother suggested that for Ronnie to know about oral sex, someone must have molested him in the past. *Id.* Ronnie then fabricated the story that Ms. Swain had performed oral sex on him. *Id.* He said all of this because this seemed like what his stepmother wanted to hear, and he was angry at Ms. Swain because of her drug abuse. (250a-251a).

Ronnie testified that he had actually learned about oral sex from watching pornographic movies at his father's house. (249a-250a). Ronnie admitted that Ms. Swain never sexually abused him, never slept naked with him, and never sent Cody to wait for the bus alone. (258a). He invented these lies because he was afraid he was going to be in trouble. (251a-252a).

Cody Swain testified that in 1995 and 1996 he lived at the trailer on Nine Mile Road with Ms. Swain, Dennis Book, and Ronnie. (275a-276a). When Book was living at the trailer, Cody would see him around the trailer "before school and sometimes after." (276a).

Cody also affirmed his prior testimony from the 2009 evidentiary hearing that he never waited for the school bus by himself, contrary to what he had testified to at trial. (277a, 287a). He also admitted that the only reason he slept on a small bed by himself (while Ms. Swain and Ronnie slept together on a larger bed) was that he used to wet the bed. (280a). Cody testified that he never saw his mother sleeping without her clothes on. *Id.* Finally, Cody confirmed that he and Ronnie learned about oral sex from watching pornographic movies in the basement of his father's house. (281a). Cody testified that he lied at his mother's trial because he had been coached by his stepmother. (278a-279a).

Mary Stephens testified that she is Ronnie's and Cody's biological grandmother and is not related to Ms. Swain. (358a-359a). She recalled that in the mid-1990s, she met Book "many

times," and that Book was living with Ms. Swain during this time. (359a-360a).

Stephens recalled that, immediately after he testified, Ronnie admitted to her that he had lied. (361a). She said she was always very close to Ronnie and Cody, and she remained that way after their trial testimony. (365a-366a). Both boys ended up living with her and graduated from high school under her watch. (366a). Over the years, Ronnie recanted his testimony "a lot of times." (363a). Stephens took Ronnie to the Albion Police station in 2002 because "he wanted to go . . . he demanded . . . he wanted to tell the truth that he lied on his mother." (361a-362a). Ronnie also admitted his perjury to his "adopted father," his "stepmother Lynn," "his biological mother and sister," and to Dr. Stephen Miller—whom Stephens took Ronnie to see "[b]ecause Ronnie wanted to see him to tell him the truth and have it all recorded." (363a-364a).

Stephens also took Ronnie and Cody to meet with former prosecutor John Hallacy around 2007. (364a). Hallacy met with the two boys separately, but Stephens was present for both meetings. (364a-365a). The boys told Hallacy that they had lied at trial and "wanted to see what else they could do" to help. (365a).

Cheryl Fox, who was once married to Ms. Swain's ex-husband Ronal Swain, supplied a sworn affidavit, which was admitted by stipulation. (370a-371a). Fox attested that when she would go to the trailer with Ronal to see the boys beginning in early March 1995, Dennis Book would be there. (303a-304a).

George Johnson, Ms. Swain's father, recalled that Book had been living with Ms. Swain for "a couple years" before he sold the trailer on Nine Mile Road to Book on November 4, 1996. (341a-342a). Johnson was very involved in Ms. Swain's defense, and he provided her trial attorney with a list of witnesses he thought would be worth calling. (343a). Johnson did not put Book on that list because he had broken up with his daughter and remained hostile. (343a, 346a). Johnson recalled that there had been a specific incident where Book had become "really irate"

and "really hot" at Ms. Swain over a missing gas can. (343a-344a). Because Book was hostile to Ms. Swain and refused to speak to her or to Johnson, Johnson decided Book was too much of a wildcard to call at trial, because Johnson (unlike Detective Picketts) did not know what Book would testify to if called as a witness. (344a) ("I didn't want to take a chance, yeah.").

Terry Anderson, a polygraph examiner with more than 35 years of experience, including more than 15 years as a Michigan State Police polygrapher, also testified. (332a-334a). Anderson administered a polygraph examination to Dennis Book and to Ronnie Swain. (336a, 352a-354a). Anderson testified that, in his professional opinion, Book was being truthful when he said that Detective Picketts contacted him regarding the allegations against Ms. Swain, and that he had refuted those allegations in his conversation with Picketts. (355a). He also testified that, in his professional opinion, Ronnie was being truthful when he indicated that his trial testimony against Ms. Swain was false, and that she had not sexually abused him. (353a).

2. *Prosecution's Witnesses*

Detective Brian Gandy of the Calhoun County Sheriff's Office worked with Detective Picketts for 15 years. (373a). Gandy testified that Picketts did not generally conduct interviews by phone. (374a). According to Gandy, whenever Picketts interviewed a witness, he "always did supplemental reports." (375a).

Deirdre Ford-Buscher, the trial prosecutor in this case, testified that Detective Picketts preferred not to conduct interviews over the phone, and that he prepared supplemental reports without fail. (388a). On the rare occasion that he did an interview over the phone, he would certainly record it. (389a, 402a) (stating that if Picketts did an interview over the phone, "that interview was recorded, always").

3. *Ms. Swain's Rebuttal Evidence*

In rebuttal, Ms. Swain submitted three exhibits that were admitted by stipulation. See

(421a-487a). The additional exhibits were excerpts of deposition transcripts of Picketts from a federal lawsuit, *Everson v. Calhoun County*, 407 Fed Appx 885 (CA 6, 2011), as well as some police reports made by Picketts, which were used as exhibits in the *Everson* depositions.[6]

In his deposition in *Everson*, Picketts admitted, contrary to the "habit" testimony of Gandy and Ford-Buscher, to conducting a phone interview of a witness and not making a written record of this interview even though the conversation was important. (429a, 432a). When asked whether he took notes during interviews, Picketts stated, "Well, sometimes I do and sometimes I don't, but most of the time I'll make little notes for myself." (426a). Picketts said that his notes from witness interviews are generally typed up as official reports by Sheriff Department staff, and then he throws his notes away and does not save them anywhere in the file. (426a-427a). Picketts also testified that whether a conversation was included in a report would "depend on what it entailed." (434a).

E. Trial Court Order Granting Relief from Judgment

After receiving summation briefs from both parties, the trial court granted the Motion for Relief from Judgment based on Ms. Swain's *Brady* claim, her claim under MCL 770.1, and her actual innocence claim based on *Herrera v Collins*, 506 US 390, 113 S Ct 853, 122 L Ed 2d 203 (1993).[7]

Judge Sindt specifically found, after considering all of the evidence presented, that

[6] *Everson* involved a § 1983 claim by Linda Everson against Detective Picketts, among other defendants. (511a-514a). Everson had reported to the Calhoun County Sheriff that her then-boyfriend, a police officer, had forcibly sodomized her. (511a-512a). The boyfriend was never prosecuted, and Picketts instead sought an arrest warrant for Everson for filing a false police report. *Id.* Everson alleged that Picketts changed one witness's statement in his report and improperly influenced another witness's statement. (513a). A jury awarded Everson one million dollars. See "Jury awards former Battle Creek dispatcher $1 million in lawsuit involving Calhoun County Sheriff's Department," August 21, 2012; *available at*: http://www.mlive.com/news/kalamazoo/index.ssf/2012/08/former_battle_creek_dispatcher.html.

[7] Judge Sindt denied relief based on the two other claims in Ms. Swain's motion: ineffective assistance of appellate counsel and the recantation of Cody Swain.

Dennis Book was credible, that the telephone interview between Picketts and Book did in fact occur, and that it was undisputed that this exculpatory conversation was not disclosed to the defense. (489a-490a). He found that Ms. Swain did not learn about the exculpatory phone interview until 2011 and that the prosecution and/or the police knew about it at the time of trial and failed to disclose it. (491a-493a). Therefore, it was in fact new evidence of a *Brady* violation cognizable on a successive motion for relief from judgment. (493a). Judge Sindt noted that, while the *Brady* standard does not require a showing of diligence from the defendant, Ms. Swain had nevertheless been diligent in pursuing Book's testimony. (492a-493a) (noting that Ms. Swain's father had asked Book to testify at the time of trial, and was rebuffed). Finally, the substance of the *Brady* evidence was in fact material and exculpatory because it decimated any credibility that Ronnie's original trial testimony would have had; the only other adult living in the house would deny that any of the events to which Ronnie testified could have occurred. (490a-491a, 485a).

In granting relief, Judge Sindt wrote that, with the new evidence, "[t]he validity and wisdom of the guilty verdicts which this Court has previously found to be unsupportable are called into even greater question." (492a). Because the totality of the evidence in this case at this point so greatly undermines the original allegations against Ms. Swain, the trial court held that relief was also warranted under the "justice has not been done" standard of MCL 770.1 and under the actual innocence standard of *Herrera*. (498a-499a).

F. Court of Appeals Decision Reversing Trial Court

On February 5, 2015, the Court of Appeals again reversed Judge Sindt's decision to grant Ms. Swain a new trial. (500a-509a). Specifically, the Court of Appeals held that Judge Sindt abused his discretion in granting Ms. Swain relief because her motion was barred by MCR 6.502(G). Further, the Court of Appeals held that even assuming the motion was not barred,

Judge Sindt abused his discretion in granting relief based on the *Brady* claim, MCL 770.1, and Ms. Swain's freestanding actual innocence claim.

Judge Cynthia Stephens concurred in the result and analysis as to the *Brady* violation and in the result only as to the actual innocence claim. (510a). Judge Stephens wrote separately to state that it was more likely than not that no reasonable juror would find Ms. Swain guilty based on the current record in the case. (510a). [8]

This Court granted Ms. Swain's application for leave to appeal on September 30, 2015.

[8] The Court of Appeals first issued its opinion on December 11, 2014. However, on February 5, 2015, exactly 56 days after its original ruling, the Court of Appeals vacated its December 11 opinion and released a new opinion. (500a-509a). The only change was the deletion of a sentence quoting language from a previous appellate decision. (507a).

ARGUMENT

Introduction and Standard of Review

This case can be decided simply on the basis of the trial court's considerable discretion to grant a new trial under MCR 6.500 *et seq.*—a decision that can be reversed only where there is an "abuse of discretion." See, e.g., *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). An abuse of discretion "occurs only when the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999) (internal citations omitted). Judge Sindt—who oversaw the trial and every subsequent hearing in this case—properly exercised his discretion to grant Ms. Swain a new trial after finding that she had met the requirements of MCR 6.502(G)(2) and presented credible evidence of a *Brady* violation.

While the *Brady* violation presents the narrowest grounds for relief, it is by no means the only grounds. Relief is also warranted to Ms. Swain—under the court rules, MCL 770.1, and the Michigan and United States constitutions—because of the substantial evidence establishing Ms. Swain's actual innocence. Just as the trial judge did not abuse his discretion in finding that Ms. Swain satisfied the requirements for relief under Subchapter 6.500, he also did not abuse his discretion in finding that the new evidence supported a finding of her actual innocence.

I. A Defendant Need Not Satisfy the Four Prongs of *Cress* in Order to Satisfy MCR 6.502(G)(2).

While MCR 6.502(G) generally prohibits more than one motion for relief from judgment, a defendant may file a successive motion if she meets either of the two exceptions set forth in MCR 6.502(G)(2). The second exception is satisfied when the defendant's claim is based on new evidence that was not discovered prior to the first motion. A later rule in the same subchapter,

MCR 6.508, describes when a defendant is actually entitled to relief on her claim, once the gateway requirement of MCR 6.502(G)(2) is satisfied.

MCR 6.502(G)(2) does not implicate *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003). Instead, that court rule is a *procedural* gateway requirement that, if met, permits the defendant to file a subsequent motion for relief from judgment based on any number of potential underlying *substantive* claims. The underlying substantive claim might be, *or it might not be*, a claim under *Cress* (new evidence that, even short of a constitutional violation, warrants relief). In Ms. Swain's case, the underlying substantive claim is a constitutional violation under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and not a *Cress* claim.

Without explanation or citation to authority, the Court of Appeals grafted the four part *Cress* standard onto MCR 6.502(G)(2)—a rule that requires only that the evidence underlying the substantive claim "was not discovered before the first such motion." Whether the elements of a substantive *Cress* claim must be met to surmount the procedural hurdle of MCR 6.502(G)(2) is a question of law that this Court reviews *de novo*. See *Hinkle v Wayne County Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002). The principles of statutory interpretation are applied to the interpretation of court rules. *Id.*

The Court of Appeals' infusion of *Cress* into MCR 6.502(G)(2) is squarely foreclosed first and foremost by the plain text of that court rule. This Court need not look further to resolve the question. However, the addition of *Cress* into the MCR 6.502(G)(2) inquiry is also inconsistent with the rest of Subchapter 6.500 and would bar meritorious constitutional claims from being raised in successive motions for relief from judgment.

A. The Plain Language of the Court Rule Forecloses an Insertion of *Cress* Into the MCR 6.502(G)(2) Inquiry Because the Court Rule is Unambiguous and Does Not Invite Further Interpretation.

Because the language of MCR 6.502(G)(2) is unambiguous and incompatible with the

four-pronged *Cress* test, the Court of Appeals' interpretation cannot be correct.

MCR 6.502(G)(2) provides, in relevant part, that a defendant "may file a second or subsequent motion [for relief from judgment] based on . . . a claim of new evidence that **was not discovered** before the first such motion." (Emphasis added). If a judge determines this exception has been met, then the motion may proceed. MCR 6.502(G). There is no ambiguity in this provision. This Court has highlighted the importance of adhering to the plain language of unambiguous text: "If the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted." *Gladych v New Family Homes*, 468 Mich 594, 597; 664 NW2d 705 (2003) (emphasis added) (internal quotations and citations omitted).

The text of MCR 6.502(G)(2) is clear: the rule is satisfied when a defendant's claims are based on evidence that "was not discovered" when she filed her prior motion. *Cress*, a different standard built for a different purpose, requires that a defendant also show that she "could not, using reasonable diligence, have discovered and produced the evidence at trial." 468 Mich at 692. MCR 6.502(G)(2)'s wording, "new evidence that ***was not*** **discovered** before the first such motion," is simply not compatible with the additional requirement of *Cress*, which demands a showing that the evidence ***could not have been*** **discovered** before the prior motion.

The Court of Appeals' decision is patently erroneous because it turns the plain words of MCR 6.502(G)(2), "was not discovered," into "could not have been discovered." Those phrases mean two very different things. The text of MCR 6.502(G)(2) is clear, and "was not discovered" must be the controlling standard under that rule. *Cress* has no place in this analysis.

B. A Holistic Reading of the Michigan Court Rules Prohibits the Application of *Cress* to MCR 6.502(G)(2).

Application of *Cress* to MCR 6.502(G)(2) is not just inconsistent with the plain language

of the court rule, but it also makes no sense when read in the context of Subchapter 6.500 and the court rules as a whole. See *Houston v Governor*, 491 Mich 876, 878; 810 NW2d 255 (2012) ("[A statutory provision] should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the Act as a whole.") (internal quotation omitted).

While MCR 6.502(G)(2) addresses the circumstances under which a defendant may *file* a second or subsequent motion for relief from judgment, MCR 6.508(D)(3) explains when courts may *grant relief* for such motions. MCR 6.508(D)(3), in stark contrast to MCR 6.502(G)(2), does address the prior **discoverability** of evidence. It provides, in relevant part, that "[t]he court may not grant relief to the defendant if the motion . . . alleges grounds for relief . . . which **could have been raised** . . . in a prior motion . . . unless the defendant demonstrates . . . good cause . . . [and] actual prejudice." (Emphasis added).

The difference in the language is not accidental. See *United States Fid Ins & Guar Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009) ("[T]he use of different terms . . . generally implies that different meanings were intended."). While a claim in a successive motion can be *considered* if it is based on evidence not previously discovered, MCR 6.508(D)(3) provides that such a claim cannot *succeed* if the claim could have been raised earlier, unless cause and prejudice can be shown.

This distinction is important for defendants like Ms. Swain because MCR 6.508(D)(3) permits the court to waive the "good cause" requirement if there is a significant possibility of the defendant's innocence (and MCR 6.502(G)(2) presently has no such actual innocence exception). Thus, even if a court were to find that Ms. Swain lacked good cause for failure to raise her claim in a prior motion, the MCR 6.508(D)(3) actual innocence exception would allow the trial court to bypass the procedural hurdle and hear the claim on the merits. Grafting *Cress* onto MCR 6.502(G)(2) thus would have the effect of making MCR 6.508(D)(3)'s actual

innocence exception useless: an actually innocent defendant who belatedly discovers the evidence of his innocence could never get past MCR 6.502(G)(2) at all. Instead, this Court should hold that the diligence requirement belongs in MCR 6.508(D)(3), where it is explicitly set forth but actual innocence can overcome it, and that it does not belong in MCR 6.502(G)(2), where it would be contrary to the plain wording of the rule.[9]

C. Grafting *Cress* Onto MCR 6.502(G)(2) Would Undermine the Rights of Defendants Alleging Constitutional Violations, Including *Brady* and *Strickland* Claims.

The consequences of grafting *Cress* onto MCR 6.502(G)(2) demonstrate that this Court did not intend such an interpretation. See *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999) (noting that court rules and statutes "must be construed to prevent absurd results.").

Applying *Cress* to MCR 6.502(G)(2) undermines the constitutional rights of defendants raising *Brady* claims by adding a diligence requirement where it is constitutionally unacceptable. As this Court recently observed in *People v Chenault*, 495 Mich 142, 145-46; 845 NW2d 731 (2014), "a diligence requirement is not supported by *Brady* or its progeny."

Although *Brady* has no diligence requirement, the Court of Appeals' reading of MCR 6.502(G)(2) would explicitly require diligence on the part of defendants bringing *Brady* claims on subsequent motions for relief from judgment. For example, according to this interpretation, if the defendant discovered evidence suppressed by the prosecution before filing her first 6.500 motion, she would simply have to meet the three-part *Brady* test. However, if, as in Ms. Swain's

[9] Additionally, this Court knows how to explicitly include a diligence requirement if one is intended. Chapter 2 of the Court Rules references "diligence" nine times; Chapter 3 makes three references; and Chapters 4, 5, and 9 each make one such reference. See, e.g., MCR 2.611(A)(1)(f) ("Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial."). If this Court meant to include a diligence requirement in MCR 6.502(G)(2), it would have done so explicitly as it did in MCR 6.508(D)(3) and elsewhere throughout the rules.

case, the prosecution succeeded in suppressing the exculpatory evidence until after she filed her first 6.500 motion, then she would have to satisfy the very same diligence requirement this Court disavowed in *Chenault*. There is no justification for such a double standard; the defendant in the second example is not at fault for the state's failure to turn over evidence but now has to make an additional showing that undermines the very purpose of *Brady*.

Rather than encouraging the prosecution to turn over potentially exculpatory evidence, as *Brady* and *Chenault* were designed to do, the Court of Appeals' interpretation of the rules would reward prosecutors for concealing evidence until the defendant has filed her first motion, after which establishing a *Brady* violation would become much more difficult. Although *Chenault* made clear that such "unwarranted concealment should attract no judicial approbation," *id.* at 155, the Court of Appeals' reading ensures that it would.

The consequences of grafting *Cress* onto MCR 6.502(G)(2) for underlying substantive *Brady* claims show that this interpretation could not have been intended. First, it puts the heaviest burden—a showing of diligence—on defendants whose evidence has been suppressed the longest, while those who are lucky enough to learn of a *Brady* violation earlier are subject to no such requirement. Second, determining which defendant is subject to which burden depends on chance, leading to different outcomes for identically situated defendants. Consider, for example, co-defendants who learn of a *Brady* violation at the same time. Based only on whether or not they have already filed 6.500 motions, the Court of Appeals would hold that one may be granted full relief while the other is barred from bringing the *Brady* claim at all. This Court could not have intended such perverse results.

As another example, consider a defendant who learns after filing a first 6.500 motion that her trial counsel had been told by the police about exculpatory evidence but had failed to obtain the exculpatory evidence for trial. To satisfy *Strickland v Washington*, 466 US 668; 104 S Ct

2052; 80 L Ed 2d 674 (1984), the defendant must show that counsel's failure to obtain the evidence was unreasonable. *Id.* at 669. But under the test set forth by the Court of Appeals, she would also have to satisfy *Cress* and thus prove that the new exculpatory evidence supporting her claim could not have been found with reasonable diligence before her prior motion. This is, of course, exactly the opposite of what she has to prove to win her *Strickland* claim.

In other words, the Court of Appeals' interpretation means that trial counsel's failure to discover exculpatory evidence could *never* be raised in a subsequent motion, even when the defendant does not learn of trial counsel's failure until after the prior motion was filed and even when the evidence in question conclusively proves the defendant's innocence. Again, the plain language of MCR 6.502(G)(2) shows that this Court did not intend this absurd outcome.

II. Under the Correct Reading of the Court Rules, Ms. Swain Satisfies Both MCR 6.502(G)(2) and MCR 6.508(D)(3).

A. Ms. Swain Satisfies MCR 6.502(G)(2) Because She Did Not Discover the Exculpatory Phone Call Until After Her Previous Motion for Relief From Judgment Was Filed.

The new evidence at issue here is the phone call between Detective Picketts and Dennis Book, in which Book told Picketts that Ms. Swain did not commit the alleged abuse. In satisfaction of MCR 6.502(G)(2), the record establishes this phone call *was not discovered* until after Ms. Swain filed her prior motion for relief from judgment. As Book testified, he did not tell Ms. Swain about the phone call with Detective Picketts (which occurred before trial) until early 2011, after Ms. Swain had filed her prior motion. (180a). Thus, the trial court correctly found that Ms. Swain satisfied MCR 6.502(G)(2). (493a).

The Court of Appeals incorrectly framed the evidence underlying the *Brady* claim as "Book's personal knowledge of events in the trailer" and concluded that it was not new evidence because Ms. Swain already knew of his personal knowledge. (503a). This characterization of the

evidence is erroneous for several reasons; for one, **it is contrary to *Brady* itself**. See Argument III(A)(1).

In fact, the *Brady* evidence at issue is the **exculpatory interview** between Picketts and Book, the disclosure of which would have dramatically changed the trial of this case. Because the prosecution did not turn over information regarding this exculpatory interview in violation of *Brady*, and because Book did not tell Ms. Swain about the interview until 2011, long after Ms. Swain filed her first motion, the evidence is new and had not been discovered at the time of the first motion.[10] MCR 6.502(G)(2) is therefore satisfied.

B. Ms. Swain's *Brady* Claim Also Satisfies MCR 6.508(D)(3).

Ms. Swain also satisfies MCR 6.508(D)(3), which governs the trial court's authority to grant relief. MCR 6.508(D)(3) requires that the defendant demonstrate that her claim could not have been raised on direct appeal or in a prior motion—unless she can show good cause for failure to raise the claim before and actual prejudice (a "reasonably likely chance of acquittal"). MCR 6.508(D)(3)(a)-(b)(i). A court may waive the good cause requirement "if it concludes that there is a significant possibility that the defendant is innocent of the crime." MCR 6.508(D)(3).

Judge Sindt correctly found that Ms. Swain met the good cause requirement of MCR 6.508(D)(3) because she could not have discovered the evidence underlying her *Brady* claim, the exculpatory phone call, before her prior 6.500 motion. (493a). Based on the testimony at the evidentiary hearing, Judge Sindt determined that Ms. Swain did not learn of the phone call until 2011, when Book visited her upon her release from prison. (493a). Judge Sindt also found that Ms. Swain could not have discovered this evidence any earlier due to the "non-disclosure by

[10] Even if, contrary to the plain language and intent of MCR 6.502(G)(2), Ms. Swain was required to show that Book's exculpatory testimony was not "discoverable" at the time of her prior motion, she easily meets that standard, as discussed in the next section.

Detective Picketts" and Book's "continued enmity toward her" from the time of trial until 2011. *Id*. Given the testimony at the hearing about efforts by Ms. Swain and her father to reach out to Book and secure his cooperation, and the testimony confirming that Book rebuffed them at every turn, (177a-178a, 206a-207a, 235a), Judge Sindt's conclusion on this point is plainly reasonable.

But Judge Sindt went on to note that even if the good cause requirement was not satisfied, MCR 6.508(D)(3) permits a court to waive the requirement when there is "a significant possibility" of actual innocence. Judge Sindt wrote:

> That "significant possibility" continues to exist in this case, even more so than the first time this Court made that determination, even using the Court of Appeals directive that all evidence, both inculpatory and exculpatory, be considered. **This Court has no doubt about it**. [494a].

(Emphasis added; typographical error corrected). Finally, Judge Sindt correctly concluded that actual prejudice resulted from the *Brady* violation, as discussed below. See Argument III(B)(3). Therefore, because neither MCR 6.502(G)(2) nor MCR 6.508(D)(3) bars relief, the trial court properly reached the merits of Ms. Swain's *Brady* claim.

III. The Court of Appeals Erred in Reversing the Trial Court's Decision to Grant Ms. Swain Relief from Judgment on the Basis of her *Brady* Claim.

The Court of Appeals erred in its application of *Brady* by mistakenly categorizing the *Brady* evidence as Book's personal knowledge instead of the phone call with Detective Picketts. The phone call, unknown to Ms. Swain until 2011, is exactly "the type of information *Brady* was designed to force into the open." *United States v Tavera*, 719 F3d 705, 712 (CA 6, 2013). The Court of Appeals compounded that error by failing to give Judge Sindt's ruling, which was based in large part on credibility determinations, the high degree of deference required.

A. The Court of Appeals Misapplied *Brady* by Incorrectly Defining the Evidence at Issue—Directly Contradicting *Brady* Itself—and Reading in Unwarranted Requirements.

Judge Sindt properly defined the *Brady* evidence as the phone call where "Book told

Picketts . . . [Ms. Swain] did not commit the crimes with which she was charged and ultimately convicted." (492a). While the call itself may have been hearsay, it still constitutes *Brady* evidence because Ms. Swain would have called Book to testify at trial if she had known about it. Because the call was not disclosed, Ms. Swain, who had every reason to think Book would be a hostile witness, did not know that Book would have exculpated her if called to testify. Thus, Judge Sindt found "**the evidence at issue is that Book was, at the time of the trial, a favorable defense witness. Picketts knew it; the defendant did not**." (492a). (Emphasis added).

However, the Court of Appeals misunderstood *Brady* and defined the evidence at issue as "Book's personal knowledge of the events and his observation of defendant's behavior with her sons." (503a). This narrow interpretation is foreclosed by the holding of *Brady* itself and places a burden on defendants that is unsupportable under the *Brady* line of precedent.

1. *The Court of Appeals' Application of* Brady *is Plainly Incorrect Because it Would Lead to the Opposite Result in* Brady *Itself.*

In *Brady*, the exculpatory evidence was a confession by Brady's accomplice that he was the one who actually strangled the victim. 373 US at 86. Brady conceded he had conspired with the accomplice to rob the victim and was present during the robbery, but he consistently argued that he should not be sentenced to death because it was the accomplice who committed the killing. *Brady v State*, 226 Md 422, 425; 174 A2d 167 (1961). Thus, even before the prosecution eventually turned over the accomplice's confession, Brady *knew the accomplice had personal knowledge* of the murder—knowledge that was exculpatory for Brady and supported his defense. In other words, he already knew the information (that Brady was not the killer) contained in the *Brady* material (the accomplice's confession), but the U.S. Supreme Court did not find that to be a barrier to concluding that the undisclosed confession was *Brady* material.

The Sixth Circuit has also held that a defendant does not lose her *Brady* protection if she

already has knowledge of the information contained in an exculpatory but undisclosed interview. In *Tavera*, the defendant was charged with conspiracy after police found drugs in a truck in which he had been a passenger. 719 F3d at 708-09.Tavera denied knowing about the drugs and claimed he was told the trip was for a construction project. *Id.* at 709. Tavera's co-defendant (the driver of the truck) told the prosecutor that Tavera did not know about the drugs, but the government did not reveal this information before trial. *Id.* Tavera, of course, already possessed this knowledge because he knew he was not involved and that the co-defendant knew this. Still, the Sixth Circuit found a *Brady* violation and stated that "the government has no reasonable justification for withholding the [material] statements." *Id*. at 714.

The point from both *Brady* and *Tavera* is clear: it is one thing for the defendant merely to know that another person has exculpatory information, and it is an entirely different thing *for the defendant to know that the other person has made a statement to the government confirming the exculpatory facts*. In the former case, the defendant may have every reason to believe that she cannot prove the exculpatory facts because the other person will deny those facts if called to testify. Because the prosecutor in *Brady* withheld the accomplice's statement, Brady did not know that his accomplice would confirm that he, not Brady, had committed the killing. Because the government in *Tavera* withheld the co-defendant's statement, Tavera did not know that his co-defendant would confirm that Tavera had no knowledge of the drugs.

But if the defendant learns that the person with exculpatory knowledge has made a statement to the government confirming those facts, the calculus changes entirely. The defendant can then simply subpoena the witness to give the same exculpatory account he previously gave to the police, and she could use that prior exculpatory statement for impeachment if needed.

Here, contrary to *Brady* and *Tavera*, the Court of Appeals reasoned there was no *Brady* violation because the evidence was Book's "personal knowledge," and Ms. Swain therefore

"knew the essential facts of Book's potential testimony." (503a-504a). **That holding in effect declares both *Brady* and *Tavera* to be wrongly decided.** In *Brady* and *Tavera*, the defendants also knew the essential facts contained in the suppressed interviews. But in those cases, despite the defendant's knowledge, the courts correctly found that the prosecution's failure to disclose the exculpatory interviews violated due process.

Here, as in *Brady* and *Tavera*, Judge Sindt correctly found that the evidence at issue is not Book's personal knowledge, but rather the information that the government had and the defendant did not: that Book, despite his strong dislike of Ms. Swain, would confirm her innocence if called to the stand. The Court of Appeals' contrary finding is clearly erroneous.

2. *The Court of Appeals' Reasoning Improperly Places a Burden on Defendants That is Unsupported by* Brady.

In mischaracterizing the evidence at issue and misconstruing *Brady*, the Court of Appeals places a legally unsupportable burden on defendants. Specifically, the Court of Appeals' interpretation requires that when a defendant knows of a witness's personal knowledge—regardless of whether she knows if that witness will testify favorably—she must call that witness to testify or be barred from bringing a *Brady* claim when she later discovers that the prosecution withheld an exculpatory statement from that witness.

It is true, as the Court of Appeals stated, that Ms. Swain "knew of Book's presence in the trailer during a portion of the relevant period, and . . . that he would be aware that abuse had not occurred in his presence." (501a).[11] But, the Court of Appeals' reasoning ignores the fact that Ms. Swain did not and could not know what Book would say on the stand, and thus she did not know what his potential testimony would be. In fact she had every reason to fear that his hostility

[11] The Court of Appeals analogized to *Benge v Johnson*, 474 F3d 236, 243 (CA 6, 2007), where the defendant "knew the essential facts that would have permitted him to take advantage of [the witness's] allegedly exculpatory evidence." But Ms. Swain did not know the essential fact—that Book would testify favorably.

would cause him to testify unfavorably. See, e.g., (177a-178a, 206a-207a, 232a-235a); (310a-311a, 343a-346a). When Ms. Swain's father reached out to Book, Book "told him [he] didn't want nothing to do with it" because he was "still pretty angry with her . . . ." (235a). The trial court understood and gave weight to this important distinction. (492a-493a).

Despite the many indications that Book would not testify favorably, the Court of Appeals reasoned that Ms. Swain should have subpoenaed Book regardless, and because she did not, she is now barred from *Brady* relief. (504a) ("[T]he only information that the telephone conversation might have led to was information already known to defendant, information which she chose not to avail herself of when she decided not to call Book to the stand.").

This reasoning cannot possibly be correct because it is, again, contrary to *Brady* itself. Under the Court of Appeals' reasoning, Brady could not obtain relief because he did not attempt to call his accomplice to the stand to confirm that the accomplice, and not Brady, committed the actual killing. Under the Court of Appeals' reasoning, Tavera could not obtain relief because he did not call his co-defendant to confirm that Tavera was ignorant of the drugs.

The error in the Court of Appeals' reasoning is that it blames the defendant for not calling a witness *who the defendant has every reason to believe will be extremely unfavorable*—when the government knows, but does not disclose, that the defendant *should* call the witness because he will testify favorably for the defendant. The Court of Appeals' reasoning thus allows the state to withhold the crucial fact that a witness would be favorable to the defendant so that the defendant will not take the risk of calling him. Such an outcome is contrary to *Brady* and this Court's decision in *Chenault*, 495 Mich at 154 ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.") (quoting *Banks v Dretke*, 540 US 668, 696; 124 S Ct 1256; 157 L Ed 2d 1166 (2004)).

B. The Court of Appeals Erred in Finding that Ms. Swain Had Not Proven a *Brady* Violation and in Failing to Defer to Judge Sindt's Findings.

As *Chenault* recently reinforced, a *Brady* claim contains only three elements: "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material." *Chenault*, 495 Mich at 155. Suppression by the police is imputed to the prosecution. *Kyles v Whitley*, 514 US 419, 437; 115 S Ct 1555; 131 L Ed 2d 490 (1995).

Judge Sindt's decision to grant Ms. Swain's motion for relief from judgment on this basis can only be reversed if it was an abuse of discretion, which is a decision "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will . . . ." *Alken-Ziegler*, 461 Mich at 227. Rather than evidencing a "perversity of will," Judge Sindt's decision was the result of careful consideration by the same judge who oversaw the trial and every subsequent proceeding. Moreover, to the extent that Judge Sindt's decision turned on the credibility of witnesses or the weight of the evidence, those findings must receive even more deference on appellate review because the trial court has a superior opportunity to evaluate such matters. *People v Roberts*, 292 Mich App 492, 503-04; 808 NW2d 290 (2011).

1. *Dennis Book's Conversation with Detective Picketts Was Suppressed.*

Based on credibility determinations, Judge Sindt found that the phone call had occurred. (491a). Judge Sindt further noted that "[t]here is no dispute that [the phone call] was not disclosed." (491a). The Court of Appeals did not contest these factual findings.

2. *The Information the Police Withheld was Favorable to Ms. Swain.*

The evidence in question—i.e., the exculpatory phone call—was plainly favorable to Ms. Swain. At trial, the defense did not call Book because, given Book's intense hatred of Ms. Swain, the defense reasonably believed that Book would not be a favorable defense witness. By failing to disclose the statements Book made during the phone call, the police suppressed

information that would have led counsel to take the opposite action. (311a-313a, 315a).

Despite Book's open hostility and his outright refusal to talk to Ms. Swain or her agents before trial, trial counsel would have had every reason to subpoena Book and put him on the stand if he had known about Book's statements to Picketts. (313a, 315a). If the exculpatory interview had been disclosed, the defense would have had an important safety net even if Book wavered: he could easily have been impeached by his prior statement given to a police detective. More than that, Book confirmed that while he did not want to testify for Ms. Swain, he would have told the truth (that Ronnie's claims of sexual abuse were false) if he had been subpoenaed and ordered to testify at trial. (178a).

The testimony Book would have provided, *that the officer-in-charge knew he would have provided*, would have been extremely favorable to the defense. His testimony would have been direct and affirmative evidence that the alleged crime never happened. (491a). Thus, because Book's statement would have led to trial testimony that would have powerfully rebutted the allegations of abuse, Judge Sindt correctly determined that the suppressed evidence was in fact exculpatory.

3. *Prejudice Resulted from the Government's Failure to Disclose the Exculpatory Phone Call.*

Failure to turn over exculpatory information to the defense requires a new trial if there is a "reasonable probability" that the suppressed information could have led to a different result. *Kyles*, 514 US at 434. "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *United States v Agurs*, 427 US 97, 113; 96 S Ct 2392; 49 L Ed 2d 342 (1976).

The verdict here was of questionable validity. Not only was there was no physical evidence or eyewitnesses to corroborate Ronnie's allegations, but Ronnie's testimony itself was

highly questionable. Ronnie admitted at trial that he had told family members that his allegations against his mother were untrue and that he had only made the allegations after he was himself accused of sexual misconduct. See (491a) (finding Ronnie's credibility at trial was "obviously tenuous"). The jury deliberated for over two days and only reached a verdict after receiving deadlock instructions. See (150a).

The importance of Book's testimony cannot be overstated. Book was the only other adult in the home besides Ms. Swain during the mornings of the alleged abuse. Thus, he was clearly in a position to know whether, as Ronnie claimed, Ms. Swain abused him every morning before sending him off to school.[12] Given the questionable credibility of Ronnie, the lack of corroborating physical evidence and eyewitnesses, and the difficulty the jury had in finding Ms. Swain guilty in the first place, Judge Sindt reasonably found that, upon retrial, with the benefit of Book's testimony, there is a reasonable probability that Ms. Swain would have been acquitted.

Judge Sindt found that all of the elements of a *Brady* claim are met. His findings and decision were supported by the record and correctly applied the law, and they do not constitute an abuse of discretion.

IV. <u>This Court Should Recognize an Exception to MCR 6.502(G)(2) Where The Defendant Can Demonstrate Actual Innocence.</u>

Because Ms. Swain satisfies the requirements of MCR 6.502(G)(2), it is not necessary for this Court to decide whether MCR 6.502(G)(2) contains an "actual innocence" exception in order to find in favor of Ms. Swain. However, even if this Court finds that the Court of Appeals

[12] Book confirmed he was actually present in the home every morning when the boys were leaving to catch the bus, unlike Steve Way, a previous boyfriend of Ms. Swain who had lived in the home before Book moved in. Way's trial testimony was entirely unhelpful for Ms. Swain because Way admitted on cross-examination that he left for work in the morning *before* anyone else in the household left. (66a-67a). Thus, Way could not say whether or not Ms. Swain abused Ronnie just before the school bus arrived every morning.

correctly applied the substantive *Cress* framework to the procedural MCR 6.502(G) gateway, or that Ms. Swain otherwise fails to satisfy that gateway, the procedural bar must yield to Ms. Swain's constitutional rights.

A. This Court Should Join the Federal Courts and Many Other States that Have Recognized Actual Innocence Exceptions to Procedural Default.

Both federal and state courts recognize that procedural barriers to review must yield if there is a strong possibility that the defendant is innocent of the offenses for which she was convicted. **Federal courts** have recognized that procedurally defaulted constitutional claims may nevertheless be heard in habeas corpus petitions if the defendant can make a showing of actual innocence. See, e.g., *Murray v Carrier*, 477 US 478, 496; 106 S Ct 2639; 91 L Ed 2d 397 (1986) ("We think that in an extraordinary case, where a constitutional violation has resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.").While procedural bars and finality are important interests, "in appropriate cases these principles must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v Isaac*, 456 US 107, 135; 102 S Ct 1558; 71 L Ed 2d 783 (1982).

Many states have established similar exceptions by way of legal decision. **California** recognizes exceptions to procedural bars in state habeas corpus petitions in cases of actual innocence. *In re Clark*, 5 Cal 4th 750, 796; 21 Cal Rptr 2d 509; 855 P2d 729 (1993) ("[R]egardless of delay or procedural default[,] relief will always be available to a petitioner who is innocent of the offense for which he was convicted."). **Indiana** likewise recognizes this exception to procedural bars in cases involving claimed innocence. *State v Huffman*, 643 NE2d 899, 901 (Ind, 1994) ("When faced with an apparent conflict between [finality and fairness], this Court unhesitatingly chooses the latter."). **Missouri** provides an exception to prevent "a manifest

injustice" and to determine if an error was committed that resulted in the "conviction of one who is actually innocent." *Clay v Dormire*, 37 SW3d 214, 217 (Mo, 2000). **Virginia** applies a miscarriage of justice exception for claims of actual innocence even in procedurally barred claims. *Reedy v Wright*, 60 Va Cir 18, 25 (2002). **New Mexico** provides an almost identical exception. *State v Nash*, 142 NM 754; 170 P3d 533 (NM App, 2007). **Nevada** requires a petitioner to make "a colorable showing he is actually innocent of the crime" to bring procedurally barred claims. *Pellegrini v State*, 117 Nev 860, 887; 34 P3d 519 (2001). **Utah** requires courts to weigh "the meritoriousness of the petitioner's claim" against the reason for the procedural bar, with actual innocence weighing heavily in favor of an exception. *Bluemel v State*, 2007 UT 90; 173 P3d 842 (2007).

In drafting MCR 6.500 *et seq.*, this Court has already expressly provided an exception to procedural default based on actual innocence in MCR 6.508(D)(3)—providing that even if a defendant cannot show "good cause" for failure to raise her claim sooner, that requirement can be waived if the she shows a "significant possibility" that she is innocent. This standard mirrors the federal exception. As one commentator has observed, MCR 6.508(D)(3) "is derived from the United States Supreme Court's ruling in *Murray v. Carrier*, which recognized that the societal interest of insuring compliance with state procedural rules cannot outweigh the societal interest in preventing the conviction of the innocent." Friedman, *Hurdling the 6500 Barrier: A Guide to Michigan's Post-Conviction Remedies*, 14 Cooley L Rev 65, 85-86 (1997). When this Court added MCR 6.502(G)(2) in 1995, there was no indication that this Court intended to abrogate the MCR 6.508(D)(3) rule allowing an actually innocent defendant to present new evidence of her actual innocence, even if she has filed a prior motion.

MCR 6.508(D) is not the only context in which this Court has recognized that innocence trumps procedural bars to relief. Michigan's version of the "plain-error rule" evidences a

commitment to the same principles underlying MCR 6.508(D)(3). As explained in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), Michigan courts generally follow the federal plain-error rule set forth in *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993), but Michigan specifically includes a special clause for innocent defendants:

> To avoid forfeiture under the plain error rule, three requirements must be met . . . Once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error **resulted in the conviction of an actually innocent defendant** . . . [*Carines*, 460 Mich at 764 (citation omitted, emphasis added).]

In sum, this Court, like many state and federal courts around the nation, has already recognized on both direct appeal and post-conviction that an actually innocent defendant should be permitted to present her legal claims despite procedural defaults. Such an exception is rooted in the notion that "the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration." *Carrier*, 477 US at 495 (internal quotations omitted). For that reason, an actual innocence exception should also be applied to MCR 6.502(G) so that actually innocent defendants can have their claims heard on the merits. Alternatively, the Court should exercise its authority to amend that rule and apply the amended rule to this case. MCR 1.201(D).

B. The Appropriate Standard for the Actual Innocence Exception in the Context of MCR 6.500, *et seq*., is a "Significant Possibility" that a Rational Jury Could Not Find the Defendant Guilty Beyond a Reasonable Doubt.

Whether the Court reads into MCR 6.502(G) an "actual innocence" exception or amends the rule to include such an exception, the Court should impose the same standard as MCR 6.508(D)(3)—which requires a "significant possibility that the defendant is innocent." Any successive 6.500 motion must meet the procedural requirements of both MCR 6.502(G)(2) and 6.508(D), and it would be unreasonable to impose two different standards for weighing actual

innocence. Further, the procedural barriers in MCR 6.502(G)(2) and 6.508(D) serve similar functions, and the "actual innocence" exceptions in each would also serve similar functions. Thus, this Court should apply the same standard whether actual innocence is being considered in the context of MCR 6.502(G)(2) or MCR 6.508(D).

This Court has never defined the phrase, "significant possibility that the defendant is innocent," from MCR 6.508(D)(3). The Court of Appeals previously applied the federal habeas standard from *Schlup* to this determination, *People v Swain*, 288 Mich App 609, 638; 794 NW2d 92 (2010), which requires a showing that it is "more likely than not that no reasonable juror would have found [her] guilt beyond a reasonable doubt." *Schlup v Delo*, 513 US 298, 327; 115 S Ct 851; 150 L Ed 2d 808 (1995). However, the federal standard is not the proper one to apply, given the language chosen by this Court, which requires only "a significant possibility that the defendant is innocent." MCR 6.508(D)(3).

Any analysis of actual innocence "must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Schlup*, 513 US at 328. Because "the line between innocence and guilt is drawn with reference to a reasonable doubt," *id.*, this Court should interpret the language "that the defendant is innocent" to mean that a jury would not find guilt beyond a reasonable doubt based on the totality of the evidence. Even the *Schlup* standard that the Michigan Court of Appeals wrongly applied in 2010 turns on a finding that a jury would not convict. *Swain*, 288 Mich App at 638. Accordingly, the appropriate standard is a "significant possibility" that a rational jury could not find the defendant guilty beyond a reasonable doubt.

To the extent that the phrase "significant possibility" needs to be defined further, at the most it should be deemed the equivalent of a "reasonable probability." "Reasonable probability is a term of art in the domain of criminal procedure" and means "a probability sufficient to

undermine confidence in the outcome." *People v Douglas*, 496 Mich 557, 604; 852 NW2d 587 (2014) (internal quotations omitted).

While the term "significant possibility" is rarely used in legal jurisprudence, it has been invoked by the U.S. Supreme Court in one very relevant circumstance. Justice Souter, speaking on materiality under the *Brady* standard, has suggested that "significant possibility" is equivalent to "reasonable probability." *Strickler v Greene*, 527 US 263, 298; 119 S Ct 1936; 144 L Ed 2d 286 (1999) (Souter, J., concurring) (suggesting that the Court should reframe the *Brady* standard as "significant possibility" because lower courts were improperly treating "reasonable probability" as "akin to the more demanding" preponderance of the evidence standard).

Moreover, defining "significant possibility" as equivalent to "reasonable probability" has an added advantage: Michigan courts are accustomed to applying the "reasonable probability" standard. Our courts routinely evaluate whether there is a "reasonable probability of a different result" in the context of *Cress*, *Brady*, and *Strickland* claims.

Whatever the meaning of "significant possibility" is, it is clear that this Court rejected the *Schlup* standard when it chose the "significant possibility" language in MCR 6.508(D)(3). Had the Court meant to make the standard "more likely than not," it would not have used the words "significant possibility." The Court of Appeals therefore erred when it decided to apply the *Schlup* test for materiality of a gateway actual innocence claim (even though, as Judge Stephens correctly concluded, Ms. Swain meets that test).

Therefore, the test should be whether there is *"significant possibility" that, given all of the evidence, a rational jury would not find the defendant guilty beyond a reasonable doubt.*

V. The Record Demonstrates That Ms. Swain Meets Whatever Actual Innocence Standard The Court Chooses To Apply.

Because Judge Sindt properly granted Ms. Swain a new trial on the basis of her *Brady*

claim, this Court need not reach beyond that issue to uphold that decision. However, Judge Sindt was also correct to find that there is a "significant possibility" that Ms. Swain is innocent under the standard of MCR 6.508(D)(3). Finally, he also reasonably determined that a new trial is warranted under MCL 770.1 and that even the much more demanding *substantive* actual innocence standard from *Herrera v Collins*, 506 US 390 (as opposed to the less demanding gateway actual innocence standard of MCR 6.508(D)(3)), is also met. (494a, 498a).

Indeed, Judge Sindt was clear that he had "no doubt" about the evidence of her innocence and wrote that, in the interest of justice, "this conviction cannot be allowed to stand." (494a, 498a). Similarly, Judge Stephens of the Court of Appeals wrote that, given the new evidence discovered since trial, "this case is one in which it is more likely than not that no reasonable juror would have found the defendant guilty." (510a).

The basis for these findings is sound. The complainant, Ronnie Swain, has recanted his testimony over and over again through the years—including in sworn testimony before the trial court in the 2011-12 evidentiary hearing. There is also significant evidence corroborating his recantation and making clear that Ms. Swain never sexually abused him. Most recently, Ronnie's recantation has been corroborated by Dennis Book, by the new recantation from Cody Swain, by the new testimony of Mary Stephens, and by the new affidavit of Cheryl Fox (admitted by stipulation in lieu of her testimony at the 2011-12 evidentiary hearing). The testimony of Book and Ronnie Swain is, in accordance with *People v Barbara*, further strengthened by an experienced polygrapher's conclusion that their exculpatory accounts are truthful. 400 Mich 352, 412-13; 255 NW2d 171 (1977). See (353a, 355a). In addition to all of this new evidence, there is also the evidence of innocence developed at prior hearings, including William Risk's and Tanya Winterburn's testimony proving Ronnie's trial testimony could not have been true, and the exculpatory evidence of several witnesses from the original trial. The weight of the evidence

now stands greatly and unmistakably in favor of Ms. Swain's innocence.

One need only imagine what the retrial of this case would be like to see how truly overwhelming the evidence of innocence is. Ronnie Swain would testify that the abuse never occurred and that he merely made it up in an attempt to explain his own sexual misconduct. This testimony would be backed up by his brother, Cody Swain. Dennis Book—who was undeniably in the house when the abuse was supposedly occurring every weekday morning—would testify that no abuse occurred and that he would have turned Ms. Swain in himself had he witnessed any. Risk and Winterburn (a neighbor who also waited for the bus and the school bus driver, respectively) would provide testimony establishing that Ronnie's original story must have been false because the Swain boys always waited for the bus together.

In the face of all of that, the prosecution would have only two possible remaining pieces of evidence. First, it would have the testimony of Deborah Charles—who would be impeached with, among many other things, her 19 uttering and publishing convictions (in addition to a list of other felonies relating to dishonesty) and her claims that she knows who killed JonBenet Ramsey. (87a-95a). And second, it would present the testimony of the state's expert that Ronnie allegedly displayed symptoms consistent with abuse. However, this testimony would deserve little weight in light of that expert's own admissions that he did not know if Ronnie had actually been abused and that other factors could explain his behavior. (60a).

The Court of Appeals made several errors in finding that Ms. Swain was unable to demonstrate actual innocence. First, it relied upon the prosecution's gross misstatement of the record regarding statements Ms. Swain made during an interview with Detective Picketts. (507a); see *supra* Statement of Facts, n.2 (describing this error). In fact, Detective Picketts himself made it perfectly clear that Ms. Swain only denied having oral sex with Ronnie *after* Picketts told her that the allegations pertained to oral sex.

Second, the Court of Appeals placed great weight on the specifics of Ronnie's original trial testimony and that of the prosecution's expert on sexual abuse of children, while quickly dismissing the importance of his and his brother's recantations and describing them as "suspect and untrustworthy." (507a-508a). But Judge Sindt made a determination that the recantations were credible, and it was improper for the Court of Appeals to substitute its own opinion for the trial court's reasonable finding, which came from an actual viewing of all of the live testimony. See *People v Tate*, 477 Mich 1066; 728 NW2d 873 (2007) (explaining that appellate courts may not substitute their judgment for that of the trial court when assessing witness credibility). In emphasizing the testimony from the original trial, the Court of Appeals ignored the repeated, consistent, and emphatic nature of the recantations and the fact that, upon retrial, both brothers (now adults) would testify that all of the allegations against Ms. Swain were false.

Finally, the Court of Appeals clearly erred in its evaluation of Dennis Book's testimony by emphasizing that, because Book admitted that he was not in the house *at all times* at which the abuse was alleged to have occurred, his testimony "is not proof that abuse did not occur." (508a). What it failed to recognize, and what Judge Sindt did recognize, is that Book's testimony directly contradicts Ronnie's original allegations that the abuse occurred *every single weekday*. Testimony that proves no abuse could have occurred on a very significant number of those days destroys Ronnie's original (and now recanted) story and the prosecution's entire theory of the case as presented at trial, as Judge Sindt explained in his opinion. (491a, 495a).

As the record stands today, this is a case that now has no professed complainant, several distinct lines of testimony undermining the initial allegations, and no remaining evidence of guilt whatsoever, except for a thoroughly discredited serial jailhouse informant. That testimony alone certainly would not be enough to convict Ms. Swain beyond a reasonable doubt upon retrial—especially given that Ronnie, who is now an adult, would emphatically testify, as he did at the

2011-12 evidentiary hearing, that he made up the allegations and that no abuse ever occurred.

Evaluating the entire record as it stands today leads not only to the conclusion that no reasonable jury would convict Ms. Swain upon retrial, but also to the conclusion that she is actually innocent. The trial court did not abuse its discretion in reaching this conclusion.

VI. Michigan Court Rules 7.316(A)(7) and 7.216(A)(7) Provide a Basis for the Appellate Courts to Grant Relief on Actual Innocence Grounds.

Even in cases in which procedural barriers would otherwise prevent an actually innocent defendant from presenting a claim, this Court has given Michigan appellate courts the authority to grant relief on the grounds of actual innocence. The Michigan Court Rules grant the authority to do justice in individual cases in MCR 7.316 and 7.216. MCR 7.316(A) provides: "The Supreme Court may, at any time, in addition to its general powers . . . (7) enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require." Similarly, MCR 7.216(A) provides: "The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just: . . . (7) enter any judgment or order or grant further or different relief as the case may require."

The language of MCR 7.316(A) is based upon this Court's inherent authority to do what "ought" to be done—even when it might contradict other court rules. See *St John v Nichols*, 331 Mich 148, 159; 49 NW2d 113 (1951) ("While this court should and does give due regard to its own rules, the promulgation thereof cannot shackle the powers of this Court to do that which ought to be done if otherwise within the powers of the court."); *Morse Chain Co v Formsprag Co*, 380 Mich 475, 484; 157 NW2d 244 (1968) (ordering the admission of evidence at the trial court, even short of abuse of discretion, in the interest of justice). This Court "possesses inherent power . . . to order a new trial whenever it deems that the ends of justice so require." *St John*, 331 Mich at 158.

The language of MCR 7.216(A) likewise reflects a duty on the Court of Appeals to do justice, an authority the Legislature also recognized when it granted trial courts the authority to grant a new trial "when it appears to the court that justice has not been done." MCL 770.1 (discussed *infra*). All layers of the Michigan judiciary therefore have the authority to provide relief, even outside the confines of formal legal claims, where justice requires it.

It would be unjust to deny an innocent person such as Ms. Swain relief and send her back to prison for what will be functionally a life sentence. See *Enmund v Florida*, 458 US 782, 801; 102 S Ct 3368; 73 L Ed 2d 1140 (1982) ("Punishment must be tailored to . . . personal responsibility and moral guilt."); *Robinson v California*, 370 US 660, 667; 82 S Ct 1417; 8 L Ed 2d 758 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."). This Court has called the imprisonment of an innocent person a "tragic miscarriage[] of justice." *People v Anderson*, 389 Mich 155, 197; 205 NW2d 461 (1973) (overruled on other grounds) (citing three cases where innocent defendants were convicted).

The U.S. Supreme Court has recognized the importance of maintaining the moral force of the law in a similar context. In *In re Winship*, 397 US 358, 364; 90 S Ct 1068, 25 L Ed 2d 368 (1970), the Court struck down a statute allowing a juvenile to be imprisoned based on a preponderance of the evidence standard because "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.* This Court, likewise, has the duty to protect the moral force of the law by not allowing procedural barriers to "leave people in doubt whether innocent men are being condemned." *Id.* Given Ms. Swain's strong showing of actual innocence, even if every claim is procedurally barred, this Court has the authority to lift those procedural barriers and allow a basis for relief in this case.

Ms. Swain recognizes that the standard under which Michigan courts should consider

granting relief not otherwise provided for by law should be more difficult to meet than the "significant possibility" test of MCR 6.508(D)(3). See *Herrera*, 506 US at 417. Nevertheless, her strong showing of actual innocence (discussed above) warrants such extraordinary relief.

In granting relief on the basis of actual innocence, Maryland requires a "substantial or significant possibility that the result may have been different." MD Crim Pro Code Ann § 8-301(a)(1). Illinois grants relief based upon an evidentiary showing "of such conclusive character as would probably change the result on retrial." *People v Washington*, 171 Ill 2d 475, 489; 216 Ill Dec 773; 665 NE2d 1330 (1996). Most states require that the petitioner show by clear and convincing evidence that no reasonable jury would find guilt beyond a reasonable doubt. Ariz R Crim P 32.1(h); Utah Code Ann § 78B-9-404; *Miller v Commissioner of Corrections*, 242 Conn 745, 792; 700 A2d 1108 (1997); *Ferguson v State*, 325 SW3d 400, 409 (Mo App, 2010); *People v Cole*, 1 Misc 3d 531, 543; 765 NYS2d 477 (NY Sup Ct, 2003); *Montoya v Ulibarri*, 142 NM 89, 97; 163 P3d 476 (2007); *Ex Parte Elizondo*, 947 SW2d 202 (Tex Crim App, 1996).

As explained in Argument V above, Ms. Swain meets each of these demanding standards. Therefore, regardless of the standard this Court selects, the Court should grant relief under MCR 7.316(A)(7), even if it deems her claims to be otherwise procedurally barred.

VII. MCL 770.1 Gives the Trial Court Discretionary Authority to Grant a New Trial When Justice Has Not Been Done.

The trial court had the discretion to grant Ms. Swain a new trial pursuant to MCL 770.1 on the basis of her strong showing of actual innocence. The statute provides:

> The judge of a court in which the trial of an offense is held **may** grant a new trial to the defendant, for any cause for which by law a new trial may be granted, **or when it appears to the court that justice has not been done**, and on the terms or conditions as the court directs. [Emphasis added.]

MCL 770.1 expressly authorizes a trial court to grant a new trial when it determines that

justice has not been done, and it grants that authority expressly in situations in which such relief cannot otherwise be granted "by law." It is a clear statement from the Legislature that a judge ought to be able to grant a new trial to ensure justice is done under even when other sources of law cannot support that relief. The use of the word "may" makes clear that such a power is discretionary and that review by an appellate court should therefore be for abuse of discretion.

Judge Sindt appropriately invoked MCL 770.1, finding that, given the new evidence, "[Ms. Swain's] conviction cannot be allowed to stand." (498a). Relief under MCL 770.1 does not mean that a defendant walks free, but merely that a new jury will hear *all* of the evidence and make a just determination about her guilt.

While MCR 6.431 and MCR 6.500 *et seq.* provide the *procedural* framework by which trial courts may grant new trials before and after the appellate process, respectively, they do not supersede MCL 770.1, a substantive statute passed by the Legislature.[13] The right of courts to act under MCL 770.1 *in addition to* the court rules is well recognized.[14]

The Court of Appeals' holding that Ms. Swain's claim under MCL 770.1 is time-barred by MCL 770.2, (506a), is incorrect. MCL 770.2(1) provides that: "[I]n cases appealable **as of right** to the court of appeals, a motion for a new trial shall be made within 60 days after entry of the judgment . . . ." (Emphasis added). Because Ms. Swain's case is not appealable as of right, her MCL 770.1 claim is not time-barred. Even if it had been time-barred, MCL 770.2(4) permits a court to grant a new trial notwithstanding the time-bar "for good cause shown." As discussed

[13] The Court of Appeals has reached the opposite conclusion in an unpublished opinion, relying on the premise that MCL 770.1 was superseded by MCR 6.431. (515a-518a; *People v Terlisner*). This premise, however, is explicitly foreclosed by this Court's precedent. See *McDougall v Schanz*, 461 Mich 15, 26-27; 597 NW2d 148 (1999) ("[T]his Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law."); see also (519a-520a; Shapiro, J., concurring).

[14] See, e.g., *People v Lemmon*, 456 Mich 625, 634-35; 576 NW2d 129 (1998) (citing both MCL 770.1 and MCR 6.431 as a basis for a trial court to grant a motion for new trial).

above and contrary to the finding of the Court of Appeals, Ms. Swain did not learn of the relevant evidence—the phone interview of Dennis Book by Detective Picketts—until 2011, so there is good cause for her failure to bring her *Brady* claim earlier.

This Court should make clear, as it has done before, that trial courts have discretion to grant new trials under MCL 770.1 in cases where "justice has not been done." See *People v Johnson*, 391 Mich 834; 218 NW2d 378 (1974) (holding that trial court acted within its discretion in granting a new trial under MCL 770.1 where the judge concluded he could not have found guilt beyond a reasonable doubt if the case had been tried to the bench); *People v Hampton*, 407 Mich 354, 372; 285 NW2d 284 (1979) (holding the trial judge acted within his discretion in granting a new trial under MCL 770.1 where he "determined upon the evidence that a reasonable mind might have a reasonable doubt").

Ms. Swain's case is precisely the sort of rare case that the Legislature had in mind when it enacted MCL 770.1, and this Court should make clear that trial courts have the discretion to grant new trials under these exceptional circumstances.

VIII. The Michigan and United States Constitutions Provide a Basis for a Freestanding Claim of Actual Innocence.

Even if the Court were to find that neither the Court's rules nor MCL 770.1 provides grounds for relief when a defendant demonstrates her actual innocence, Ms. Swain is entitled to relief on her freestanding claim of actual innocence, which is grounded in both the Michigan Constitution and the United States Constitution.

A. The Michigan Constitution

The Michigan Constitution provides two independent bases on which Ms. Swain may be granted relief: the prohibition against cruel or unusual punishment and the guarantee of due process of law. This Court has the authority to interpret the Michigan Constitution to afford

greater protection than the United States Constitution, and it has, on occasion, "led rather than followed the United States Supreme Court" in acknowledging important individual rights. *People v Bullock*, 440 Mich 15, 28 & n.9; 485 NW2d 866 (1992). Even if the United States Constitution has not yet been interpreted to provide an avenue for relief, this Court should join other states in recognizing a freestanding claim of actual innocence.[15]

This is especially true given the difference in the text of the Michigan Constitution (barring "cruel **or** unusual" punishments), compared to the United States Constitution (barring cruel **and** unusual punishments). Const 1963, art 1, § 16; US Const, Am VIII; *Bullock*, 440 Mich at 30 ("This textual difference does not appear to be accidental or inadvertent."). This Court has made clear that "significant textual difference between parallel provisions of the state and federal constitutions may constitute a compelling reason for a different and broader interpretation of the state provision." *Bullock*, 440 Mich at 31 (internal citation omitted).

Incarceration of an innocent person violates the Michigan Constitution's prohibition against cruel or unusual punishment. Const 1963, art 1, § 16. The U.S. Supreme Court has held that a punishment is cruel and unusual when it is "nothing more than the purposeless and needless imposition of pain and suffering." *Herrera*, 506 US at 431 (Blackmun, J., dissenting) (quoting *Coker v. Georgia*, 433 US 584, 592; 97 S Ct 2861; 53 L Ed 2d 982 (1977)). Under the Michigan Constitution, as this Court has long recognized, punishment is also cruel *or* unusual when it is grossly disproportionate to the offense. *Bullock*, 440 Mich at 32; *People v Lorentzen*, 387 Mich 167, 176; 194 NW2d 827 (1972) ("[T]he dominant test . . . is that the punishment is in excess of any that would be suitable to fit the crime."). Incarceration of an innocent person fails

[15] At least three states, New Mexico (*Montoya*, 142 NM 89), Illinois (*Washington*, 171 Ill2d 475), and New York (*Cole*, 1 Misc 3d 531) have recognized that claims of actual innocence are cognizable under the due process and/or cruel and unusual punishment clauses in their state constitutions.

to advance any legitimate goal of punishment and therefore constitutes purposeless imposition of pain and suffering. See *Montoya*, 142 NM at 97. And there are certainly few punishments that are more grossly disproportionate than the imprisonment of a person who is actually innocent. See *id*; *Cole*, 1 Misc 3d at 542. Therefore, imprisoning an innocent person would violate Article I, Section 16 of the Michigan Constitution.

Incarceration of an innocent person also violates Article 1, Section 17's guarantee that the state shall not deprive any person of "life, liberty or property, without due process of law." Const 1963, art 1, § 17. "Under the aegis of [federal constitutional] substantive due process, individual liberty interests . . . have been protected against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *People v Sierb*, 456 Mich 519, 522-23; 581 NW2d 219 (1998) (quoting *Collins v City of Harker Heights*, 503 US 115, 125; 112 S Ct 1061; 117 L Ed 2d 261 (1992)). The purpose of substantive due process is "to secure the individual from the arbitrary exercise of governmental power." *Id.* at 523.

The continued incarceration of a person who can demonstrate his or her actual innocence is an extreme form of arbitrary exercise of government power. When the wrongful incarceration of an innocent person occurs, there has been a "failure to observe that fundamental fairness essential to the very concept of justice." *Id.* at 538 (Cavanagh, J, dissenting) (internal citation omitted); see also *Montoya*, 142 NM at 97; *Cole*, 1 Misc 3d at 541-42. That failure is multiplied when the unjust imprisonment persists even in the face of powerful evidence of actual innocence.

This Court has been reluctant to expand the scope of substantive due process beyond the explicit textual source of constitutional protection. This reluctance is generally proper, but not in all circumstances. Protecting the innocent from unjust incarceration is the rare situation where such an exercise of judicial power is justified, because "the most fundamental injustice is the conviction of an innocent person." *Reed*, 449 Mich at 392.

B. The United States Constitution

This Court should also recognize a freestanding actual innocence constitutional claim based on *Herrera*, 506 US 390, as many sister jurisdictions have done. In *Herrera*, the U.S. Supreme Court assumed, without deciding, that the "execution of an innocent person would violate the Constitution." *Carriger v Stewart*, 132 F3d 463, 476 (CA 9, 1997). The Ninth Circuit noted that, culling the views presented in the different opinions of the *Herrera* court, a majority of justices would have explicitly held that execution of an actually innocent person would violate the Constitution. *Id.*

Herrera strongly suggested that a freestanding actual innocence claim would also apply in non-capital cases. 506 US at 405 ("It would be a rather strange jurisprudence . . . which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison."). See also *Robinson*, 370 US at 667 (suggesting that imprisoning an innocent person for even one day would be cruel and unusual punishment). It is fundamentally unfair to punish an innocent person for a crime she did not commit, whether the person is sentenced to death, to life in prison, or to Ms. Swain's sentence of 25 to 50 years. Indeed, the Ninth Circuit and the Texas Court of Criminal Appeals have rejected the idea that freestanding actual innocence claims are limited to capital cases. See, e.g., *Jones v Taylor*, __ F3d __, 2014 WL 4067217 *3 (CA 9, 2014); *Elizondo*, 947 SW2d at 204-05.

At least three states, California,[16] Connecticut,[17] and Texas,[18] have recognized that freestanding actual innocence claims exist under the federal Constitution based on the language in *Herrera*. For other states, including Illinois, New Mexico, and New York, *Herrera*'s reasoning informed the decision to recognize freestanding actual innocence claims under their

[16] *Clark*, 5 Cal 4th at 796-97.
[17] *Miller*, 242 Conn at 792.
[18] *Elizondo*, 947 SW2d at 204-05.

own state constitutions. See Argument VIII(A).

Therefore, while Ms. Swain believes that it is not required for the disposition of this case, this Court should recognize that freestanding claims of actual innocence are cognizable in Michigan courts under both the state and federal constitutions.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Ms. Swain respectfully requests that this Court reverse the Court of Appeals decision, reinstate the trial court's decision, and remand this case for a new trial.

Respectfully Submitted,

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